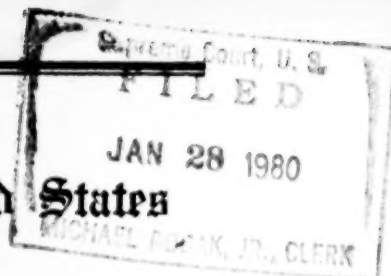


IN THE
Supreme Court of the United States

OCTOBER TERM, 1979



No. 79-136

SIDNEY A. DIAMOND, Commissioner of Patents and
Trademarks,

Petitioner,

vs.

ANANDA M. CHAKRABARTY,

Respondent.

**BRIEF ON BEHALF OF THE NEW YORK PATENT LAW
ASSOCIATION, INC. *AMICUS CURIAE***

NEW YORK PATENT LAW ASSOCIATION, INC.
345 Park Avenue
New York, New York 10022
JEROME G. LEE
President-Elect

WILLIAM F. DUDINE, JR.
405 Lexington Avenue
New York, New York 10017
(212) 697-7660

PAUL H. HELLER
59 Maiden Lane
New York, New York 10038
(212) 425-7200

Attorneys for Amicus

New York, New York
January 28, 1980

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Question Presented

Is the invention of an industrially useful, man-made microorganism excluded from patent protection as a "manufacture" or "composition of matter" under 35 U.S.C. §101 because the microorganism is alive?

Identity of Amicus

The New York Patent Law Association, Inc., is an association comprised of over one thousand private and corporate attorneys who practice patent and trademark law in the New York metropolitan area. Our association is concerned with the advancement of the arts and sciences through an effective patent system. Apart from this general public interest, we have no interest in the outcome of this proceeding. The consent of the parties to the filing of this brief has been obtained and is being separately filed with this Court.

Summary of Argument

For purposes of this brief, we accept the petitioner's statement of the case. Petitioner's statement of the question is too broad for the reasons given by the court below; accordingly we adopt the lower court's statement (596 F.2d at pp. 975-6) paraphrased as set forth above.

Petitioner's brief begs the question by arguing that the Patent Act should not be "extended" to cover new life forms. No such extension is involved here. Rather, the lower court on two separate occasions has carefully considered and concluded that the language of 35 U.S.C. §101 already permits issuance of a patent on "any . . . new and useful . . . manufacture, or composition of matter" and thereby comprehends the invention concededly¹ made by respondent herein.

¹ The novelty and utility of the invention and the adequacy of the disclosure and claims directed to that invention (covered by 35 U.S.C. §§102, 103 and 112 respectively) are admitted by peti-

(Footnote continued on following page)

In doing so, the lower court followed the statutory approach set forth by this Court in *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 396 (1968):

. . . our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change.

In *Fortnightly* and more recently in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 (1975) this Court cited with approval the following holding in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925):

While the fact that the radio was not developed at the time the Copyright Act . . . was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute *may be applied to new situations not anticipated by Congress*, if, fairly construed, such situations come within its intent and meaning . . . While statutes should not be stretched to apply to new situations not fairly within their scope, *they*

(Footnote continued from preceding page)

tioner. Process claims to the invention stand allowed. The only issue (Ref. petitioner's question) is whether 35 U.S.C. §101 bars a patent on the *product*. Hence, this Court should avoid "importing into its inquiry under 35 U.S.C. §101 the criteria of novelty and inventiveness. Section 101 is concerned only with *subject-matter* patentability." (emphasis added) *Parker v. Flook*, 437 U.S. 584, 600 (1978).

should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries. (emphasis added).

Approached from this viewpoint, the statutory language "any . . . new and useful . . . manufacture, or composition of matter" does not preclude but instead broadly comprehends issuance of patents on animate as well as inanimate inventions that are manufactures and compositions. Animate and inanimate inventions may be patented so long as they satisfy the other "conditions and requirements" (35 U.S.C. §101) of the Act and thereby "promote the Progress of Science and useful Arts". U.S. Const. art. 1, §8.

It makes no sense for petitioner to argue that an emerging field of technology is unpatentable because it broaches "areas wholly unforeseen by Congress". The underlying philosophy of the Patent Act is that disclosures of new technology so benefit the public that they should be encouraged. The more revolutionary the technology, the more its disclosure promotes the progress of the useful arts. It is therefore a logical absurdity to suggest that Congress intended some technology to be outside the scope of the Patent Act solely because it was "too new"—too radical a departure from what had gone before.

We recognize that the Chakrabarty invention stands at the cutting edge of biological technology—nothing less than a new microorganism which never existed until synthetically created by its inventors. Regardless of the outcome of this case, research in this new field will proceed at an ever-increasing pace. The question this Court must face is whether that research will continue only under the cloak of trade secrecy or under the full disclosure requirements of the patent system. Beyond any doubt, the patent

approach better meets the Constitutional purpose of promoting the progress of science and useful arts.

Contrary to the petitioner's argument, the issue is not whether research into living microorganisms and genetic engineering raises serious economic and social questions and thus should be regulated. The Patent Act says nothing which even remotely suggests a relationship between patentability and the economic or social sensitivity of given fields of research. Nobel's research on dynamite had dramatic social and economic consequences, as did Fermi's work with nuclear fission, but this had no bearing on the patentability of their inventions and discoveries. Totalitarian states exile their out-of-step scientists. A free society demands that its scientists not be discriminated against, even discrimination through denial of patents on their work because in the view of some people their work might have serious social or economic consequences.²

Nor is this an issue of obtaining a "monopoly" over new forms of life, as argued by the petitioner. In this time when our nation needs technological innovation, the monopoly argument should be recognized for what it is, i.e., an unreasoned contradiction of the basic purpose of our patent system. The rationale of Mr. Justice Story in

² Of course, this is not to say that research cannot or should not be discouraged, encouraged or otherwise regulated dependent on Congress' determination of the public interest. On the contrary, there is ample precedent for Congress to restrict the normal operation of the patent process when the consequences of a given type of innovation so warrant. For example the Atomic Energy Commission Act (42 U.S.C. §2181) in effect provides for eminent domain taking of patent rights in certain areas of nuclear research. Similarly, in areas sensitive to national security patents may be held in secret (35 U.S.C. §§181-183). However, in all such instances the inventor is ultimately accorded his patent rights or otherwise compensated for them.

Blanchard v. Sprague, 3 Sumner, 535, Federal Cases, No. 1518 (CC Mass. 1839)³ should not be ignored:

... Patents for inventions are ... a just reward to ingenious men, and ... highly beneficial to the public, not only by holding out suitable encouragements to genius and talents and enterprise, but as ultimately securing to the whole community great advantages from the free communication of secrets and processes and machinery, which may be most important to all the great interests of society,—to agriculture, to commerce, and to manufactures, as well as to the cause of science and art. In America this liberal view of the subject has always been taken, and indeed it is a natural, if not a necessary result from the very language and intent of the power given to Congress by the Constitution on this subject. Congress (says the Constitution) shall have the power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right of their respective writings and discoveries. Patents, then, are clearly entitled to a liberal construction, since they are not granted as restrictions upon the rights

³ Cited with approval by this Court in *Wilson v. Rosseau et al.*, 4 How. 646, 708, 11 L.Ed. 1141, 1169 (1846); *Hogg et al. v. Emerson*, 6 How. 437, 486, 12 L.Ed. 505, 526 (1848); *O'Reilly et al. v. Morse et al.*, 15 How. 62, 118, 14 L.Ed. 601, 625 (1853); *Brooks et al. v. Fiske, et al.*, 15 How. 211, 224, 14 L.Ed. 665, 670 (1853); and *Winans v. Demmead*, 15 How. 330, 341, 14 L.Ed. 717, 722 (1853).

of the community, but are granted to promote science and useful arts.⁴

The decline in America's inventive output corresponds directly with the erosion of our inventors' patent rights.⁵ It thus ill serves the judicious resolution of this issue for petitioner to raise the ludicrous specter of "human life ... 'owned' by patent holders."⁶

Nor is there merit in petitioner's argument that the Plant Patent Act of 1930 somehow changes the meaning

⁴ Mr. Justice Clark in *Graham v. John Deere Co.*, 383 U.S. 1, 8 (1966) characterized the change of attitude of Thomas Jefferson (who drafted the words of §101 here in question) as, "His views ripened ... " in a shift from opposing to favoring the limited monopoly grant. In Jefferson's words, "Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. ... Nobody wishes more than I do that ingenuity should receive a liberal encouragement." (ibid)

⁵ The contrast between the patent system of the United States as now practiced and competitive foreign systems is drawn by Mr. Irving S. Shapiro, Chairman, E.I. duPont de Nemours & Co., in "Technology's Decline," *Vital Speeches of the Day*, Vol. XLV, No. 12, April, 1979. Mr. Shapiro traces the U.S. decline in innovation to the loss of the patent incentive. He compares the systems of the United Kingdom, West Germany and Japan where "patents tend to be honored" to our system where attitudes and procedures "cast a cloud over patents."

⁶ The mischief of petitioner's position also becomes apparent when one considers the imprecision of the demarcation between things alive and things not alive. Yeast, yogurt, apple cider—apple jack—apple vinegar, et al are "alive". Should this fact alone preclude issuance of a patent to an inventor of a new and useful form or an improvement of these materials? Should the patent issue on condition that the inventor "kill" the organism, thereby destroying its utility? The demarcation between plant (which petitioner concedes is patentable) and animal is even more difficult, further demonstrating the illogic and practical untenability of petitioner's position.

of Jefferson's words enacted in the prior Patent Act back in 1793. On the contrary, Section 101 must be taken as this Court said in *Fortnightly*, supra, 392 U.S. at 401-2, "as we find it". The Plant Patent Act cannot retrospectively constrict the scope of patentable invention contemplated by the clear words of the prior statute ("any . . . manufacture, or composition"). And even if the Plant Patent Act were considered, for reasons discussed by the lower court, it is not inconsistent with but rather agrees with the conclusion that Section 101 was intended to and does comprehend the invention here involved.

ARGUMENT

I.

Contrary to petitioner's argument, the lower court did not "extend" the Patent Act to cover all sorts of new life forms. Rather it correctly found that a new, industrially useful, man-made microorganism should not be denied patent protection as a "manufacture" or "composition of matter" under 35 U.S.C. §101 of the Act.

Petitioner's primary argument is that the Court of Customs and Patent Appeals erred because it extended the coverage of the Patent Act without a clear and certain signal from Congress to new life forms not presently comprehended by the Act. In so arguing, petitioner begs the question.

The lower court made clear at 596 F.2d 984-7 that it was not extending the Act. Rather, the court applied the Act to specific facts which demonstrated that the invention fell within *existing* subject matter patentability requirements of Section 101 of the Act. The lower court

pointed out that the Patent and Trademark Office has from at least as early as 1873 granted patents on living things, the case there being a patent to Louis Pasteur for yeast as an article of manufacture. Also noted were various forms of bacteria, mushroom, virus, plant seeds, eggs—the list was not intended to be all-inclusive but merely illustrative of patents already issued on animate things.

The lower court also cited the House and Senate Reports accompanying the 1952 reenactment of Section 101 which state, "a machine, or a manufacture . . . may include anything under the sun that is made by man . . ."⁷, concluding:

We look at the facts and see things that do not exist in nature and that are man-made, clearly fitting into the plain terms 'manufacture' and 'compositions of matter.' We look at the statute and, plainly, it appears to include them. We look at its legislative history and are confirmed in that belief. We consider what the patent statutes are intended to accomplish and the Constitutional authorization, and it appears to us that protecting these inventions, in the form claimed, by patents will promote progress in very useful arts. When we merely determine the policy underlying a statute we are not making policy. (596 F.2d at p. 987).

⁷ This view is consistent with the above expressed thoughts of Jefferson and Story, and also of Chief Justice Taney in *O'Reilly, et al. v. Morse, et al.*, 15 How. 62, 119 (1853),

Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact, that anyone skilled in the science to which it appertains, can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. (emphasis added).

Petitioner argues that the "only judicial pronouncements on the subject suggested that living things are not themselves patentable" and that the "CCPA had itself so indicated," citing *Guaranty Trust Company v. Union Solvents Corporation*, 54 F.2d 400, aff'd, 61 F.2d 1041 (3rd Cir. 1932), cert. denied, 288 U.S. 614 (1933) and *Application of Mancy, et al.*, 499 F.2d 1289, 1294 (CCPA 1974). There is no basis for petitioner's position that these cases negate patentability herein. On the contrary, the lower court discusses them at 596 F.2d 975-7 and concludes by pointing out:

These decisions illustrate . . . that processes, one of the categories of subject matter specified in §101, are uniformly and consistently considered to be statutory subject matter notwithstanding the employment therein of living organisms and their life processes. Witness the action of the PTO in the present case in allowing the process claims. . . .⁸ (emphasis added)

Having begged the question and assumed, contrary to the fact, that the lower Court somehow "extended" the coverage of the Patent Act,⁹ petitioner argues that this

⁸ The lower court also points out the obvious illogic of the petitioner's position in that petitioner concedes patentability of the life forms here involved when incorporated in a process, but denies patentability when used as a product. The social and economic consequences so troubling to petitioner are no more or less ameliorated by patenting the life forms as process claims rather than product claims. Hence, what impact does the alleged life/non-life distinction have?

⁹ Petitioner also relies on various positions taken by various patent law associations on proposed legislation on what can best be described as peripherally related issues. This argument has so little weight as to warrant little or no response. Viewed in the proper light, it only demonstrates a possibly unduly precautionary attitude on the part of the Bar to ensure application of the law consistent herewith and/or requests for added protection as to plant and animal breeders, such as is discussed by the lower court at 596 F.2d 980-984.

"extension" is improper because there has been no "clear and certain signal" from Congress justifying the extension, citing *Parker v. Flook*, 437 U.S. 584, 596 (1987).

The *Flook* decision does not really bear on the issue at hand. It dealt only with the question of whether a mathematical principle (long acknowledged to be unpatentable) became patentable subject matter under Section 101 upon being tied to a specific application.¹⁰ *Flook* had nothing to do with defining what constitutes a "manufacture" or "composition" under Section 101. Thus, grant of a patent in *Flook* would have constituted an extension of the Patent Act. The present case does not.

Likewise, petitioner's reliance on *Deepsouth Packing Co. v. Laitram*, 406 U.S. 528 (1976) is misplaced. *Deepsouth* involved the use of an issued patent to obtain extra-territorial relief beyond that which the courts had previously granted. Thus, the relief therein sought would have "extended" the patent beyond the geographic scope contemplated by the Act with no supporting signal from Congress. No such extension of rights is involved in these proceedings.¹¹

Petitioner stretches its "clear and certain signal"¹² argument further by arguing in Point II that the Plant

¹⁰ As this Court held, "Very simply, our holding today is that a claim for an improved method of calculation, even when tied to a specific end use, is unpatentable subject matter under Section 101." (447 U.S. at 595)

¹¹ The lower court distinguished these cases at 596 F.2d 964-7. Petitioner makes no effort to respond to the distinctions drawn by the court.

¹² The lower court took as its "clear and certain signal" this Court's holding in *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 199 (1933), "We should not read into the patent laws limitations and conditions which the Legislature has not expressed."

Patent Act in 1930 shows that Congress in 1793 did not intend to protect animate inventions as patentable subject matter. The court below fully answered this argument at 596 F.2d 978-984. Little would be served in repeating or paraphrasing that answer. Instead we would refer only to petitioner's attempted reply.

Petitioner argues first that the views of the 1930 Congress¹³ are "particularly useful" because they "illuminate the meaning of the obscure but key words 'manufacture or composition of matter'" (Pet. Brf. p. 8). Petitioner omits the word "any" which precedes the words "manufacture or composition of matter" in Section 101.

But what is obscure about these words? The word "any" requires no further definition—it is clear on its face. As this Court held in *Gordon v. Appeal Tax Court, Md.*, 44 U.S. 133, 147 (1845), there can be no limiting "refinement upon the etymology of the word 'any,' out of or beyond its meaning in common discourse . . .". What petitioner seeks to do is not only to disregard it (see above), but to inject the opposite meaning of the word into the statute. This was criticized by this Court in *United States v. Noce*, 268 U.S. 613, 619 (1924) as,

. . . a strained method of first finding an inconsistency, by no means clear, if it exists at all, and then erecting it into an implied repeal. Implied repeals are not favored.

The word "manufacture" has been defined in an unrelated but nevertheless valid context as follows:

The word 'manufacture finds its etymological source in the Latin ablative 'manu', meaning 'by

¹³ Petitioner also relies on the Plant Variety Protection Act of 1970. The remarks herein apply to petitioner's arguments on the 1970 Act as well.

hand', and 'facere' meaning 'to make'; hence, 'to make by hand.' It is apparent that this literal definition passed with the coming of the machine age and hence is too narrow for present use. As a result, even the standard dictionaries broaden the scope of its meaning.

In general, there appear to be three essential elements involved in manufacture: (1) original material, referred to as raw material; (2) a process whereby the raw material is changed; and (3) a resulting product which, by reason of being subjected to the processing, is different from the original raw material. *Binswanger Glass Company v. United States*, 293 F.Supp. 676, 679 (D.C. Va. 1968).

The word "composition of matter" has been defined in a patent context as follows:

This phrase covers all compositions of two or more substances and includes all composite articles, whether they be results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids. See Walker on Patents, vol. 1, p. 55, par. 14. *Shell Dev. Co. v. Watson*, 149 F. Supp. 279, 280 (D.C. D.C. 1957).

Hence, there is nothing "obscure" about these words. One need not review reams of reports to reveal their meaning. Given their ordinary meaning and viewed in the context of their Constitutional purpose, as was done by the lower court, they clearly comprehend the invention here involved.¹⁴

¹⁴ Petitioner also chides the lower court for not citing more legislative history on Section 101 (Pet. Brf. 9). Since this provision to the extent herein relevant goes back to Thomas Jefferson in 1793, the paucity of legislative history might be excusable.

In further reply to the lower court, petitioner concedes that the court considered the legislative history of the Plant Patent Act and "offered two principal arguments in an effort to explain it away" (Pet. Brf. p. 9). The first of these two "principal arguments" as reported by petitioner was that "Congress did not think it important that plants were alive, but only that they were within an agricultural (non industrial) 'field of endeavor' that required stimulation from the patent system." This is a grossly distorted characterization of the lower court's discussion of the purposes of the Plant Patent Act at 596 F.2d 980-4, as is clear from even a cursory review of this part of its decision.¹⁵

A second lower court "argument" allegedly disposed of by petitioner is that ". . . in 1930, Congress considered that plants were not patentable because they were thought to be a product of nature 'unaffected by the hand of man'". Again, petitioner misses the point of the lower court's decision. Here, the court pointed out that a "secondary purpose" of the Act was "to avoid the *judicial interpretation* . . . that products of nature are not statutory subject matter." (emphasis added). The lower court noted that Congress was aware of this objection and concluded that it would be inapplicable to asexually produced plants because, *inter alia*,

a plant discovery resulting from cultivation is unique, isolated, and is not repeated by nature, nor

¹⁵ The *In re LeGrice*, 301 F.2d 929, 939 (CCPA 1962) decision relied on by petitioner supports rather than conflicts with the lower court's decision. There, the court in 1962 noted that, "Current studies to 'break the chromosome code' may" add to our knowledge to the extent that one "may someday secure possession of a plant invention by a description . . . as is now possible in other fields of inventive effort". That day has arrived in this case as to respondent's microorganism.

can it be reproduced by nature unaided by man. . . . (596 F.2d at p. 982-3).

Hence, the lower court's conclusion that the 1930 Plant Patent Act does not relate to the patentability *vel non* of living things is supported by its legislative history. That Act, which was intended to facilitate issuance of plant patents, should not be used to correspondingly obstruct issuance of other patents. And its legislative history should not be used to frustrate the broad Constitutional purpose implicit in the language of Section 101 of the Act that dates back to 1793, i.e., to promote the progress of science and useful arts through the grant of patents to all new and useful manufactures and compositions which otherwise meet the conditions and requirements of the Patent Act.

The lower court's decision is consistent with that purpose.

CONCLUSION

**For the reasons set forth above, the judgment of the
Court of Customs and Patent Appeals should be affirmed.**

NEW YORK PATENT LAW ASSOCIATION, INC.
345 Park Avenue
New York, New York 10022
JEROME G. LEE
President-Elect

WILLIAM F. DUDINE, JR.
405 Lexington Avenue
New York, New York 10017
(212) 697-7660

PAUL H. HEILER
59 Maiden Lane
New York, New York 10038
(212) 425-7200
Attorneys for Amicus

New York, New York
January 28, 1980